Pump Court

Construction Newsletter – Case note on the Court of Appeal's decision in Building Design Partnership Ltd v Standard Life Assurance Ltd [2021] EWCA Civ 1793

Guidance on pleading and proving sampled or extrapolated claims

Summary

1. Construction lawyers will be familiar with the use of sampling and extrapolation in presenting evidence to prove claims. They are commonly used, for example, in defects cases. The question for the Court of Appeal in this case, however, was whether a party could, in effect, go back a step and *plead* a claim at the outset on the basis of sampling and extrapolation.[1] The answer was yes.

Background

2. Standard Life was the developer of a mixed retail and residential development in Newbury, Berkshire. Costain was engaged to carry out the construction works. The contract sum for the building contract was agreed at £77.4m. The final account was almost twice that, at £146.6m. £50.3m of the final account paid to Costain was made up of 3,604 variations and associated loss and expense claims.

3. Standard Life brought claims against a number of the project team, including the contract administrator, BDP, which it alleged was largely responsible for considerable overspend. Standard's Life's case was that BDP had authorised variations to the building contract which were unjustified and avoidable, led to delay and disruption and loss and expense.

4. Standard Life investigated 167 variations. The value of Standard Life's claim in relation to these 167 variations was £3.7m. This was one part of what was known as the Detailed Claim. Standard Life assessed that (i) of those 167 variations, 122 variations, i.e. 83.1%, were the responsibility of the design team; and (ii) of those 122 variations that were the responsibility of the design team, BDP were responsible for 81.71% of the value.

5. Standard Life then extrapolated these results across the remaining 3,437 variations which it had not investigated in order to make a series of specific allegations against BDP. First, Standard Life took the 83.1% (the % of variations for which it said the design team were responsible) and extrapolated that across the remaining 3,437 variations. This gave it a figure of £23.6m (being 83.1% of the £28.4m element of the final account paid to Costain for variations to the building contract). Secondly, Standard Life applied the 81.71% representing the proportion that BDP, as opposed to other members of the design team, was specifically said to be responsible for to arrive at a figure of £19.3m (i.e. £23.6m x 81.71%).

6. Standard Life performed the same exercise in relation to the £21.9m which it had paid to Costain in the final account

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for loss and expense claims. Together, these steps taken by BDP in relation to variations and loss and expense were referred to as the Extrapolated Claim and gave rise to a total damages claim of over £20m.

7. BDP objected to the Extrapolated Claim: it sought to strike out and/or obtain reverse summary judgment on that part of the action on the basis that such a pleading was an abuse of process and/or disclosed no reasonable grounds for bringing such a claim.

First Instance Decision (Kerr J)

8. At first instance,[2] Kerr J dismissed BDP's application. He held that it would have been disproportionate to require Standard Life to investigate and plead out every variation and related loss and expense claim which formed part of its Extrapolated Claim. Although there was likely to be both "wheat" and "chaff" in the Extrapolated Claim, it could not be said that the Extrapolated Claim was entirely bad to the extent required for the application to succeed. The judge exercised his discretion to require Standard Life to conduct limited further investigations on variations of BDP's choosing and to otherwise re-plead the case to remove any unsupportable allegations and generally 'clean up' the pleadings.

9. BDP appealed. Although the pleadings had moved on considerably by the time of the appeal hearing, the Court of Appeal's decision relates, as did the application and the judgment against which an appeal was sought, to the original statement of case.

Court of Appeal's Decision (Coulson LJ, Birss LJ and Macur LJ)

10. The Court of Appeal dismissed the appeal against Kerr J's decision to allow Standard Life to plead its original statement of case on an extrapolated basis without pleading a detailed case on each of the allegations. The lead judgment was given by Coulson LJ with which Birss LJ agreed, adding a very short judgment of his own. Macur LJ agreed with both judgments. The main strands of the Court's reasoning were as follows.

11. First, the Court of Appeal cited and approved two recent first instance decisions which supported the principle that a party could plead a claim on the basis of sampling and extrapolation.[3]

12. Second, the Court of Appeal dismissed BDP's criticism that the judge had failed to set out the 2-stage test set out in *Cable v Victoria*[4] in relation to the question of abuse of process. BDP alleged that rather than asking, first, whether there was an abuse, and secondly, if there was an abuse, what as a matter of discretion should be done about it, the judge treated the application as one which called for a unitary case management decision, thereby leading himself into error. Following a careful consideration of the judge's decision, this argument was rejected: although the judge did not expressly set out the two stage test, it was clear that he had followed that path.[5]

13. Third, the Court of Appeal's reasoning gives significant weight to the role of proportionality.[6] Despite previous case law suggesting otherwise, the Court held that proportionality could properly be considered as part of the first limb of the 2-stage test (i.e. when answering the question 'was there an abuse?'). It held that for it to do otherwise and ignore questions of proportionality at that stage, would be artificial. Moreover, such an approach was confirmed by the terms of the overriding objective which applies generally to the pleading of cases. It was, therefore, necessary to ask:[7]

> "is it proportionate and in accordance with the overriding objective for Standard Life to plead the Extrapolated Claim in this way? If it is, then *provided that BDP can understand the case that they have to meet, and that case has a real as opposed to fanciful prospect of success*, it cannot be said that the Extrapolated Claim falls foul of r.3.4(2) or should be struck out." (emphasis in original)

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14. The Court of Appeal held that the Extrapolated Claim was a proportionate way of addressing the 3,437 un-investigated variations. The fact that such a pleading may make the claim more difficult to establish at trial was an inherent part of the trade-off to be negotiated between, on the one hand, saving costs by not doing things which may be done if money were not object, and on the other, maintaining a realistic prospect of ultimate success. The alternative approach, proposed by BDP, that in order for it to understand the claim Standard Life would need to plead out all of the variations item by item would have resulted in unacceptable costs. The Court estimated that these costs would have been as much, if not more than, the sums at stake themselves, and based a pro rata calculation such further pleadings and schedules would have filled an eye watering 60 odd further lever arch files.

15. The Court of Appeal also concluded that BDP did know the case it had to meet.[8] In doing so it, made the following points:

a) First, the case was a standard defects case. It was a claim for damages for negligence and breach of contract supported by detailed schedules. It did not raise any novel points of law.

b) Second, BDP fully understood the Detailed Claim. Those allegations were concerned with late, inadequate, inaccurate, incomplete or uncoordinated design information or over-certification. The Court held, therefore, that BDP understood the case it had to meet, because the allegations in the Extrapolated Claim were based on the same grounds as those in the Detailed Claim. The underlying themes to the allegations in the Detailed Claim plainly cut across all aspects of the project and BDP made no submission seeking to distinguish the Extrapolated Claim from the Detailed Claim. The Court noted, however, that if, in a different case, a defendant had no way of understanding what it needed to do to defend itself against an extrapolated claim then such a claim would be likely to be found to be an abuse of process.

c) Third, on a practical level, having been the design team lead throughout, BDP must be taken to have a more detailed knowledge than anyone else of the variations and how they came about. Despite being aware of detailed complaints raised during the project about the design information, BDP had not set out a positive case exculpating itself.

16. The Court concluded noting that this was not a case where, as BDP submitted, the Court was being asked to draw an inference from 'apples' to 'pears'. The only difference between the two sets of variations was that one set had been investigated, and the other had not. Drawing an inference from one group to the other was not susceptible to being struck out and/or summarily dismissed because both sets of variations were "*issued by the same people, on the same project, in the same circumstances, namely an atmosphere of increasing costs and widespread concern about the control of the process*".[9] BDP knew the case it had to meet in respect of the Extrapolated Claim, and the Extrapolated Claim had a real rather than fanciful prospect of success.

17. Three further points of note were made by the Court of Appeal.

a) First, there is nothing special or different about professional negligence cases that means that extrapolated claims cannot be pleaded as part of a professional negligence action. The distinction which had sought to be drawn by BDP to make this submission, that pleading by way of sampling and extrapolation was only appropriate in cases of "*systemic failure, where what was essentially the same defect arose across a project or product*", was rejected as a matter of principle.

b) Second, the Court of Appeal rejected BDP's submission that allowing the claim to proceed put unfair commercial pressure on BDP because with such a large part of the claim having been made without any investigation, BDP would be forced to settle the claim due to the risk that the Extrapolated Claim might succeed and/or due to the costs it would incur investigating the 3,437 variations itself. The Court pointed out that (i) BDP, as leaders of the design team and having ordered and subsequently approved payment of the variations, knew more about them than Standard Life and was well placed to assess the risks presented by the Extrapolated Claim; and (ii) had Standard Life investigated and

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pleaded out all of the 3,437 remaining variations at the outset BDP would have objected to the vast costs that would have been incurred by Standard Life, and would have argued that Standard Life's conduct in frontloading such significant costs had put commercial pressure on BDP to settle the claim. BDP could not have it both ways.

c) Third, the Court rejected the "*apocalyptic picture*" painted by BDP of the floodgates opening to undetailed claims resulting in defendants being cheated of the right to know the case they had to meet and being found liable to pay damages on a basis they never understood. The Court noted that pleading every detail should not be regarded as the paradigm method of framing commercial and construction disputes, particularly if there were more proportionate alternatives that enabled the defendant to know the case that it had to meet. The grinding detail of claims may have to be fully pleaded and investigated in certain types of construction dispute, but that should only ever be commensurate with the overriding objective.

18. The Court of Appeal also upheld the judge's decision as regards the exercise of his discretion.[10]

Practical Considerations

19. This decision may be considered beneficial for potential claimants. Pleading by extrapolation might well be considered likely to make the task of pleading large and seemingly unwieldy cases more manageable. Correspondingly, the confirmation that such pleadings are permissible may, at first blush, leave defendants (and their insurers) somewhat concerned. However, hard versions of either of these conclusions would be premature. Practical considerations for both those seeking to bring and defend extrapolated claims will need to be investigated on a case by case basis.

20. First, parties should think carefully about whether their pleadings can be made more proportionate by way of pleading by sampling and extrapolation. The Court of Appeal was undoubtedly correct in its assessment that requiring the pleading and investigation of all of the variations would have frontloaded very significant costs and accelerated the all too familiar stage in a dispute where the issue of the costs surpasses or threatens to surpass the underlying dispute in terms of significance. Claimants may be buoyed by this. However, by the same token, defendants may be encouraged to push back against claimants who threaten to or do incur substantial costs investigating every last item, by proposing sampling as more appropriate. Parties ought to work together to discuss and seek to agree (i) during pre-action, how the parties' positions ought to be pleaded; and (ii) during the litigation, and certainly by the first CMC, a proposal (for the Court's approval) for how the evidence is to be collected and marshalled throughout the steps in the proceedings.

21. Second, it ought not be forgotten that (notwithstanding his rejection of the defendant's application) Standard Life's pleading came under a sustained attack from the judge at first instance and was subject to case management decisions which resulted in Standard Life amending its pleading to reduce very considerably the size and significance of the Extrapolated Claim (down to approximately only 5% of the total claim). Although for the purpose of its judgment the Court of Appeal accepted that the change in emphasis in the amended pleadings did not affect the point of principle to be decided, it made clear that the change in position was reached as a result of the judge's careful case management directions and the further burdens he imposed on Standard Life to 'clean up' their pleadings, notwithstanding the failure of the application. CPR 1.4 provides that the Court must further the overriding objective by actively managing cases. Orders of the type given by the judge at first instance in this case may be highly appropriate during proceedings where claims are pleaded by way of sampling.

22. Third, the decision is a reminder that there is often a large difference between pleading a case and proving it. An underlying theme of the Court of Appeal's decision is that claims based on sampling and extrapolations are likely to be difficult to prove. In both of the recent first instance decisions which the Court of Appeal approved as authorities demonstrating that in principle sampling and extrapolation could be used to plead a case, the extrapolated claim failed at trial.

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23. The success of proving a claim by extrapolation will be significantly impacted by the particular sample or samples and its or their representativeness. Such matters are highly case specific. Parties to actions where sampling is used, whether claiming or defending, will be anxious to scrutinise whether the proposed sample(s) truly reflect(s) the total population of allegations as a whole. The success or failure of the inferences the court if invited to drawn will depend upon the quality of the selection of these samples. In *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd (No.2)* [2017] EWHC 1763 (TCC), the claim failed at trial because the sample of 412 welds (from over 28,000) was not representative. Similar issues arose in *Amey LG Ltd v Cumbria County Council* [2016] EWHC 2856 (TCC) and were subject to a very detailed analysis by HHJ Stephen Davies sitting as a Judge of the High Court.[11] However, beyond these examples, detailed judicial consideration of the appropriateness of samples is relatively rare. Selecting a random sample or the use of statistical confidence will often be employed, but Birss LJ's judgment makes clear that such statistical sampling is not a prerequisite, and a wider basis of inference may be permissible.

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[1] Paragraph [43], [2021] EWCA Civ 1793.
[2] Neutral Citation: [2020] EWHC 3419 (TCC).
[3] *Amey LG Ltd v Cumbria County Council* [2016] EWHC 2856 (TCC) and *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd (No.2)* [2017] EWHC 1763 (TCC) cited at paragraphs [44] – [47] of the Court of Appeal's judgment, and further approved expressly at paragraph [54].
[4] [2020] EWCA Civ 1015.
[5] Paragraphs [48] – [51].
[6] Paragraphs [55] – [61].
[7] Paragraph [57].
[8] Paragraphs [62] – [79].
[9] Paragraph [70].
[10] Paragraphs [95] – [103].
[11] In particular at paragraphs [1.22] – [1.34] and [25.99] – [25.189].

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